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In The
Supreme Court of the United States
October Term, 1982

Pyramid Lake Paiute Tribe of Indians,
Cross-Petitioner,
v.
Truckee-Carson Irrigation District, *et al,*
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS, RENO, SPARKS AND WASHOE COUNTY

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STATEMENT OF CASE

The Statement of the Case as offered by Petitioners, State of Nevada, No. 81-2245, and Truckee-Carson Irrigation District (TCID), No. 81-2276, gives a very complete and accurate rendition of the history of not only these proceedings but also that of the *United States* v. *Orr Water Ditch Co., et al.*, Equity No. A3 (D. Nev. 1944) (*"Orr Ditch"*), a case which was intended by all concerned to be an all inclusive water adjudication to all

the rights and claims to the waters of the Truckee River. TCID App. A-33.[1]

As is pointed out by Petitioner, Nevada, on page 2 of its brief, the Truckee River is the life blood of the largest population center in Western Nevada. It flows through the Truckee Meadows, distributing its waters to the region so that its people can survive, grow, and prosper—just as the aorta artery distributes blood to the body so that it may sustain life and grow. This analogy may seem extreme, but "all the facets of life and economy in said area have been and are dependent upon the beneficial use of the waters of the Truckee River and its tributaries." Joint Appendix (JA) p. 258.

The citizens of the Truckee Meadows area, which consists of the cities of Reno and Sparks and most of the population of Washoe County, have spent "billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems and other municipal and industrial facilities and operations" (JA 259), all in reliance on the water rights set forth in the *Orr Ditch* Final Decree. The Defendants in this action are fighting to protect their homes and communities which require water now sought by the Tribe. This population center is the cultural and educational hub of Western Nevada with the University of Nevada, a land grant institution, Truckee Meadows Community College, and the National Judicial College, all of which are dependent upon the waters allocated to the area by the *Orr Ditch* Decree.

Rather than reiterate the Statement of the Case as presented by the Petitioners Nevada and TCID, Reno, Sparks

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[1] "TCID App." refers to the Appendix filed by TCID in connection with its Petition for Writ of Certiorari—No. 81-2276.

and Washoe County will emphasize key points while presenting our argument below.

SUMMARY OF ARGUMENT

The Court of Appeals properly found that the Cross-Petitioners could not relitigate their water rights claims against the *Orr Ditch* defendants by virtue of res judicata.

The *Orr Ditch* case was in litigation for thirty-one years until 1944. It was commenced to adjudicate *all* the water rights upon the Truckee River. TCID App A-100, A-33. During that period, the United States under the *Winters* doctrine sought to claim "to the fullest extent" the amount of water that could be used by the Indians for the purposes for which the reservation was established. JA 269-270. The *Orr Ditch* defendants fully litigated the adverse water claims, as against the Government claims and among themselves. *E.g.*, Ex B-484, JA 366-375.

The Tribe was competently represented by the United States throughout the *Orr Ditch* litigation. Even if there had been any improprieties in the representation (which is denied), it was unknown to the *Orr Ditch* defendants. TCID App. A-107, A-47. The United States was well aware of the *Winters* decision and had a full and fair opportunity to litigate a fishery right in *Orr Ditch*, which was a comprehensive water rights quiet title adjudication. See, *e.g.*, JA 264-270.

The *Orr Ditch* defendants, and subsequent appropriators, have heavily relied upon this final decree and expended billions of dollars based upon the reasonable understanding that *Orr Ditch* was what it purported to be, an all inclusive and final adjudication of the water rights on the Truckee River. JA 269-270. The decision of both courts below dismissing this action with respect to the *Orr Ditch* defendants, their successors in interest and subsequent appropriators should be upheld.

ARGUMENT

Both courts below are correct in respect to the application of the doctrine of res judicata as it applies to the *Orr Ditch* defendants.

A. Res Judicata Bars the Tribe's Claim

Circuit Judges Skopil, Tuttle and Schroeder agree that the traditional principles of res judicata protect the *Orr Ditch* defendants (TCID App., pp. 31-50).[2] With a fact-based question presented, the Cross-Petitioner seeks to persuade this Court to disregard long-standing res judicata principles. Cross-Petitioner seeks avoidance of res judicata because of its claim of special facts—an argument which both courts below have rejected. After a review of a comprehensive record, the Court of Appeals upheld the most material "special fact" in the case—namely, that the *Orr Ditch* defendants reasonably relied on the authority of the United States to obtain a conclusive judgment on behalf of the Pyramid Lake Tribe. The Court wrote:

> "The question is whether the *Orr Ditch* defendants were aware of the failure by the government to fulfill its responsibility to adequately represent the Tribe in litigation. The answer to this question determines whether the *Orr Ditch* defendants reasonably relied on the government's representation of the Tribe's interests. The district court found that any impropriety in the government's representation 'was unknown to the defendants in *Orr Ditch*.' Finding No. 31, R. 5602. The plaintiffs do not challenge this finding. We cannot say it is clearly erroneous. *Accordingly, the Orr Ditch defendants are entitled to rely on the final decree.*" (TCID App., p. 47) (Emphasis added).

The finding is fatal to the Cross-Petitioner's allegation concerning a "massive conflict" between the Newlands

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[2] Reno, Sparks and Washoe County are *Orr Ditch* defendants and successors in interest to rights adjudicated in *Orr Ditch*.

Project and the Pyramid Lake Indian Reservation, which the Tribe claims led to improper and inadequate representation by the United States. Cross-Petitioner's Brief, p. 15.[3] Because the *Orr Ditch* defendants had no knowledge of the alleged failure of proper representation because of a conflict of interest (or for that matter, any other ground upon which Cross-Petitioner may be alleging they were improperly represented), then the *Orr Ditch* defendants can properly rely on the prior decree and have res judicata protection (TCID App., p. 47). Restatement (Second) of Judgments (1982) § 42(1)(e).

The Tribe has not offered any evidence to refute this finding, and in fact has conceded, at page 10 in its Brief in Opposition to Nevada's—TCID's Petitions for Writ of Certiorari:

> "The Court could not undertake to review concurrent findings of fact by two lower courts in the absence of an obvious and exceptional showing of error."

Berenzi v. *District Director, Immigration and Naturalization*, 385 U.S. 630, pp. 635-636, 1967; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. It should be pointed out also that the Judges at the appellate level properly applied the "clearly erroneous" standard to the District Court's findings of fact while it independently reviewed the evidence to assess the findings (TCID App., p. 20).

Under the principles of the doctrine of res judicata, when a court of competent jurisdiction has rendered a final judgment on the merits of a cause of action, the parties to the lawsuit and their privies are precluded from relitigating any claim of law or fact that they raise or should have raised in the initial proceedings. E.g., *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398

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[3] In a finding of fact not disturbed on appeal, the District Court found no conflict of interest in the Government's representation. TCID App. A-107. This finding was supported by substantial evidence. (E.g., JA 515, 517-524; TCID App. A-105-A-106).

(1981); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319-320 (1927); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876). *See generally* 1B J. Moore & T. Currier, Moore's Federal Practice, ¶¶ 0.405-0.419, at 628-630 (2d ed. 1982 & Supp. 1981-82) (hereinafter Moore's Federal Practice); 1 Restatement (Second) of Judgments (1982) §§ 17-26; Restatement of Judgments (1942) §§ 45-67; 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (1981 & Supp. 1982) §§ 4402, 4406-4415, 4427-4462 (hereinafter Wright & Miller).

This doctrine serves important policies. It fosters reliance on judicial decrees, eliminates expense to parties, conserves judicial resources, and minimizes the possibility of inconsistent results. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). There are hardly maxims more firmly established or more valuable in the administration of justice than those designed to prevent repetitious relitigation. *United States* v. *Throckmorton*, 98 U.S. 61 (1878). *See, Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. at 401-402; *Montana* v. *United States*, 440 U.S. at 153-154; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 328-329 (1971); *Southern Pacific R.R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897); *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 820 (1952); *Vestal, Res Judicata/ Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723, 1724 (1968); 1B Moore's Federal Practice, supra, ¶ 0.405[1] at 628-630; 18 Wright & Miller, supra, § 4403.

Res judicata is particularly important here because *Orr Ditch* was brought to determine and adjudicate all the water rights on the Truckee River once and for all, so that all users could govern themselves accordingly. TCID App. A-100. This finding of fact was upheld by the Court of Appeals which stated:

> "This issue is determined by the district court's findings of fact regarding the intent of the government in bringing the *Orr Ditch* case. The district court found '[t]hat *Orr Ditch* was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims' to the waters of the Truckee. This finding is not clearly erroneous. The complaint was drafted in comprehensive terms, and was certainly adequate to assert all of the governments water rights claims. The purpose of the proceedings was to obtain a decree upon which all parties could rely. This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties." (TCID App., P. 33).

The Tribe attempts to convince this Court, in essence, that all the elements of res judicata were not established in the lower courts. But the record and findings clearly indicate this is not so. TCID App. A-104, A-107, A-108. As was mentioned above, this was intended to be an all-inclusive adjudication. Anything short of that would have defeated the purposes for which the action was brought and litigated over more than 30 years. It would be inconsistent for any of the parties to have agreed to or accepted this decree if there was even an inkling of a possibility that an outstanding senior claim was not intended to be included in this cause of action. The Tribe is in error in its claim that its cause of action is necessarily different because it was not a party to the *Orr Ditch* case. It is well established that a person who is not a party to an action but who is represented by a party is bound by a judgment as though he were a party. Restatement (Second) of Judgments § 41 (1982). It is fundamental that the United States had full authority to represent the Indians in *Orr Ditch* and bind them to the judgment. *Heckman* v. *United States*, 224 U.S. 413 (1912).

As found below, "the Tribe and its members were at all times material herein and now are in privity with the plaintiff in the *Orr Ditch* proceedings." TCID App., p. 103. There can be no question that the Tribe is bound as if it were named as a party in *Orr Ditch*.

Secondly, the Tribe contends the "same evidence test" would necessarily make a fishery claim a different cause of action. The appellate court correctly disposed of this contention when it stated:

> ". . . We find this analysis unpersuasive. The basis for either kind of reserved right would be the same: the executive actions by which the Reservation was established, and the intent that motivated those actions. *See United States* v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). The priority date depended on the same evidence. The water rights are appurtenant to the same reservation, and relate to the same course of water. Though a determination of quantity would depend on different evidence, this by itself is insufficient to distinguish this cause of action from the *Orr Ditch* cause of action . . ." TCID App., P. 32.

For the Tribe now to say different evidence was necessary to establish an additional claim merely states what is true of all the parties to the action, as each defendant independently had to introduce evidence and documents to sustain its particular claim to waters in the Truckee River. The Tribe's argument leads to absurdity because the purpose of the litigation was to leave no additional claims open. The Tribe's conclusion "would abolish the broader res judicata doctrine of claim preclusion in water adjudication, leaving only the doctrine of collateral estoppel or issue preclusion to prevent relitigation." TCID App., pp. 33-34.

Finally, the Cross-Petitioner asks the Court to look at the pragmatic considerations to determine if the fishery

claim was the same cause of action. In the comments from Restatement (Second) of Judgments (1982) § 24, it states on page 197:

> "The present trend is to see a claim in factual terms and to make it coterminus with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split."

The transaction in this case was a claim for water rights from the Truckee River based upon the *Winters* doctrine. In applying the considerations set forth in Restatement (Second) of Judgments (1982) § 24(2), we find that the causes of action are identical. The basis for the present claim is the *Winters* doctrine (identical time and space) to water from the Truckee (same origin). As found below, the motivation for bringing *Orr Ditch* was to adjudicate all of the rights and claims to the waters of the Truckee and obtain a decree that all parties could rely upon. The *Orr Ditch* quiet title action was the only practical way in which this purpose could be accomplished. (JA, 263-278). *Orr Ditch* was intended by all as the only "trial unit" possible. The multiple claims of the United States in *Orr Ditch* were contested by the *Orr Ditch* defendants as they proved their own respective claims and challenged the adverse claims of other parties. The relative claims of all parties definitely established justiciable issues between the *Orr Ditch* defendants and each of the Government's claims. The Tribe does not contend its irrigation right established against the *Orr Ditch* defendants is in any way invalid. TCID App. A-104.

Finally, we must look at the parties' expectations. The entire purpose of the *Orr Ditch* action was to adjudicate all of the claims to the Truckee River waters. Based upon those "expectations", the defendants herein have invested billions of dollars in improvements (JA 259) and have maintained their homes and communities. It can hardly be questioned that the expectation of the Truckee River water users is and has always been that res judicata will protect the decree.

The Tribe suggests they are innocent victims of the government's conflicting responsibilities and capacities. Yet they knew that the United States was not seeking water for fish, but did not intervene. TCID App. A-101, A-102. To the contrary, the *Orr Ditch* defendants would be the innocent victims if the Court were to uphold the Tribe's position. As was pointed out above, any impropriety on behalf of the government's representation (specifically found not to exist) was unknown to the defendants in *Orr Ditch*.

The claim of lack of procedural due process (which is denied) is no defense against the *Orr Ditch* defendants or subsequent appropriators, as they had no knowledge of claimed government impropriety.

The appellate court, after lengthy discussion, assumed the Tribe was not given adequate representation by the United States in the *Orr Ditch* case. TCID App., pp. 34-49. However, it went on to follow the long established rule that if the opposing party was not on notice of facts which would make the failure of adequate representation apparent, then he may rely on the final decree. Restatement (Second) Judgment § 42. As was stated earlier, the appellate court upheld the finding of fact that any impropriety in the government's representation "was unknown to the defendants in *Orr Ditch*." TCID App. p. 47. The Tribe did not challenge this finding and cannot chal-

lenge it here. Accordingly, res judicata should be afforded the *Orr Ditch* defendants, successors in interest and subsequent appropriators.

B. Not only is the opinion of the Appellate Court accurate and correct in respect to the Orr Ditch defendants, it is also a fair and just decision for the residents of the Truckee Meadows.

The Truckee Meadows is a water-short area. Analysis of the historical water supply available in the Truckee River discloses that on the basis of present uses (without the attempt to impose a senior right for fishery purposes), insufficient supply has been available to meet Reno-Sparks decreed rights in 12 of the 48 years in the period 1927-1974, and in 8 of 39 years in the period 1925-1967. (See Nevada's Brief in the Ninth Circuit, p. 60).

The imposition of the claimed senior fishery water right on the Truckee River would cause severe shortages in the Truckee Meadows. Irrigation uses, necessary for the survival of vegetation in the local desert environment, would be severely cut back. Farmers' crops and alfalfa would die; lawns and trees would be permitted to die; recreation areas and parks would lose their grass and trees. Even drinking water supplies would be shorted. (Transcript Volume 35, pp. 6679-83).

Forty-three trial days were expended in this case, most of which dealt with evidence addressing the "hurt" or "harm" question which would occur if an 1859 right was superimposed over all other *Orr Ditch* decree rights. The government and Cross-Petitioner attempted to show at trial that the fishing right could be superimposed over existing *Orr Ditch* final decree rights and produce no harm, thereby allowing the court, in "balancing the

equities", to decline application of the doctrine of res judicata. However, in Finding 32 the trial court found:

> "The plaintiff and the Tribe have failed to sustain their burden of proof by evidence of sufficient quality and credibility to prove that no harm or 'hurt' will be sustained to the vested legal rights of priority water right holders under the *Orr Ditch* final decree if an 1859 right is superimposed over all other *Orr Ditch* decreed rights for certain minimum flow into the Truckee River for spawning and for flow into Pyramid Lake." (TCID App. A-107).

This finding was not overturned by the Court of Appeals.

The courts below were correct factually and legally because equitable relief will not be granted as against innocent third persons, like the *Orr Ditch* defendants, who, in good faith, have acted on the faith of a judgment which is later challenged. *Bradburn* v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947). See also *Clay* v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962). See *Teter* v. *Irwin*, 71 S.E. 115 (W.Va. 1911). In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), this Court upheld a prior seizing of Indian property even though such seizing may have been mistaken, because the land had been open to settlement and possession by innumerable innocent purchasers. The same result was reached in *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

As the Court has ruled in connection with reliance by innocent parties:

> "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their

> change. Legislatures may alter or change the laws, without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of law when the administrators of it are changed. Courts ought not to be compelled to bear the influction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgment." *The Minnesota Mining Company* v. *The National Mining Company*, 70 U.S. 332, 334 (1866).

The justifiable reliance on the *Orr Ditch* Decree by the *Orr Ditch* defendants, and others, outweighs the equitable claims made by the Cross-Petitioner, which, as stated above, also fail for lack of proof.

Virtually the entire civilization of western Nevada, including all of its people and its economy, has grown and developed in reliance on the *Orr Ditch* Final Decree. Lives and properties of tens of thousands of people, rightfully relying on the *Orr Ditch* Final Decree, will be devastated if the *Orr Ditch* Final Decree is not upheld.

CONCLUSION

The application of res judicata in this case seems so well established that it makes one wonder if this argument of denial of due process is being offered to support the main thrust of Cross-Petitioner's appeal—namely, that against TCID. To quote Cross-Petitioner's brief in opposition to Nevada's and TCID's Petitions for Certi-

orari, "no practical purpose would be served by reviewing the Court of Appeal's decision upholding the res judicata defense of all defendants other than TCID." p. 20.

The decision of the Court of Appeals insofar as it affirms dismissal of the *Orr Ditch* defendants, successors in interest and subsequent appropriators on the grounds of res judicata, should be affirmed.

Respectfully submitted,

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